

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

<b>Case Title:</b> THE STATE v TIMOTEUS IKELA	<b>Case No:</b> CR 38/2023
High Court Review Case NO.: 290/2023	<b>Division of Court:</b> High Court, Main Division
<b>Coram:</b> Miller AJ et Liebenberg J	<b>Delivered on:</b> 29 March 2023
<b>Neutral citation:</b> <i>The S v Ikela</i> (CR 38/2023) [2023] NAHCMD 154 (29 March 2023)	
<b>ORDER:</b>  1. The conviction of the accused is altered to one of guilty of assault with the intent to do grievous bodily harm.  2. All references to the provisions of the Combating of Domestic Violence Act are deleted.  3. The sentence is substituted with:	

The accused is sentenced to a fine of N\$500 or three (3) months imprisonment.

4. The sentence is antedated to 14 February 2023.

5. The order made in terms of section 300 of Act 51 of 1977 is rescinded.

#### **REASONS FOR ORDERS:**

MILLER AJ (LIEBENBERG J concurring):

[1] The accused was charged with the crime of assault with the intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act 4 of 2003 (“the Act”).

[2] In substance, the allegations were that on 22 January 2023 he assaulted Ester Nghilinganye by punching her with a fist in the face, strangling her and pulling her hair.

[3] It was further alleged that the provisions of the Act find application by virtue of a past relationship between the accused and the complainant, they being boyfriend or girlfriend at some stage prior to the incident. It is common cause that the relationship came to an end sometime prior to the alleged assault.

[4] When asked to plea to the charge, the accused tendered a plea of guilty. The learned magistrate then proceeded to put certain questions to the accused ostensibly in terms of section 112(1)(b) of Act 51 of 1977.

[5] From the answers provided by the accused, the magistrate concluded that the accused was guilty and accordingly he was found guilty as charged.

[6] The prosecutor then called the complainant to give evidence. She testified, inter

alia, that she had spent the sum of N\$400 to purchase medication for the injuries she sustained during the assault upon her. She confirmed that the accused used to be her boyfriend but stated that the relationship had come to an end sometime prior to the assault upon her.

[7] The learned magistrate sentenced the accused as follows:

'In my view an appropriate sentence accused is sentenced to a fine of N\$5000 or eight months imprisonment and in terms of section 300 of CPA 51 of 1977 as amended accused is ordered to compensate the complainant Ester Nghilinganye in the amount of N\$400 to be paid through the Clerk of Court at the Luderitz Magistrate Court on or before 31 March 2023.'

[8] When the matter came before me on review, I directed the following remarks to the magistrate:

'1. The learned magistrate is requested to provide reasons for the finding that the provisions of the Domestic Violence Act, Act 4 of 2003 is applicable, when on the facts the accused and the complainant were no longer in a relationship at the time of the incident.

2. The learned magistrate must provide reasons for invoking the provisions of section 300 of Act 51 of 1977 in the sum of N\$400.'

[9] I have since had the benefit of the magistrate's reply.

[10] The magistrate firstly points out that by definition the term "domestic relationship" includes relationships which had come to an end prior to an incident of violence. To that end the magistrate is correct.

[11] The magistrate, however, overlooked the provisions of section 3(2) of the Act. It reads as follows:

'(2) Subject to subsection (3) where a "domestic relationship" is based directly or

indirectly on past marriage, past cohabitation or any other past intimate relationship, the “domestic relationship” continues for one year after the dissolution of the marriage or engagement, the cessation of cohabitation or the end as any other intimate relationship...’ (my underlining)

[12] There is nothing on record to establish when the relationship, assuming it to be an “intimate relationship” came to an end. In those circumstances, it cannot be said that the provisions of the Act finds application. I may add that subsection (3) finds no application.

[13] I turn to the award made by the magistrate in terms of section 300 of Act 51 of 1977. Section 300 finds application only when the crime of which the accused is convicted has caused damage to or loss of property. The crime of assault upon another person is not a crime which causes loss or damage to property; but rather one which causes an injury to another person.

[14] The result is that I am obliged to interfere. Firstly, the conviction of the accused should be altered to one of assault with the intent to do grievous bodily harm and any reference to the Act should be deleted. That would in turn have the effect that the sentence imposed should be reduced. The order made in terms of Section 300 of Act 51 of 1977 should be rescinded.

[15] I make the following orders:

1. The conviction of the accused is altered to one of guilty of assault with the intent to do grievous bodily harm.
2. All references to the provisions of the Combating of Domestic Violence Act are deleted.
3. The sentence is substituted with:

The accused is sentenced to a fine of N\$500 or three (3) months imprisonment.

4. The sentence is antedated to 14 February 2023.

5. The order made in terms of section 300 of Act 51 of 1977 is rescinded.

**K MILLER**  
**ACTING JUDGE**

**J C LIEBENBERG**  
**JUDGE**